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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. GENE WHITAKER, JR., et al., Defendants and Appellants.	C064531 (Super. Ct. No. 08F09616)

APPEAL from a judgment of the Superior Court of Sacramento County, Kevin R. Culhane, Judge. Affirmed.

Mark David Greenberg, Cara DeVito, and Hilda Scheib, for Defendants and Appellants.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Julie A. Hokans, Supervising Deputy Attorney General and John A. Bachman, Deputy Attorney General, for Plaintiff and Respondent.

This appeal arises after a two-jury trial of Gene Whitaker, Jr., his son, Gene Whitaker, III, and Dewayne Presley.[1]

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* Pursuant to California Rules of Court, rule 8.110, this opinion is certified for publication with the exception of Part II.

[1] The record confusingly refers to Gene Whitaker, Jr. as "Sr." or "G," and to Gene Whitaker III, as "Jr." or "Little G." We refer to the former as Whitaker and the latter as Whitaker III.

Presley and Whitaker III beat and tried to shoot Melvin Weathers at the behest of Whitaker, in retaliation for a prior incident in which Weathers had broken Whitaker's jaw. Presley and Whitaker III, and a broken rifle, were found near the scene. Whitaker's sister, Beverly Robinson, reported that Whitaker had "hyped" up the other defendants into attacking Weathers. Each defendant was a member of the East Side Piru gang. Each defendant was convicted of attempted premeditated murder and other charges, and each received a life sentence.

After the first jury was selected, the trial court delayed swearing in the jury, pending resolution of prosecution witness problems. When those problems were resolved adversely to the People, they moved to dismiss the case for lack of evidence. The trial court granted the motion, and the People later refiled the charges. Defendants then moved to dismiss the refiled charges, contending that allowing the People to refile the charges improperly thwarted double jeopardy protections, and violated due process principles. The trial court denied the defendants' motions, and the jury trial ensued.

In the published portion of this opinion (Part I), we first describe the events leading to the dismissal of defendant's first case. Then, as we explain, we assume the trial court erred in finding good cause to delay swearing in the first jury, but conclude that this error does not require reversal of the convictions arising from the jury verdicts, because defendants have not suffered a double jeopardy or due process violation.

In the unpublished portion of this opinion (Part II), we describe the facts relevant to the jury trial from which defendants' appeals were taken, and reject all other contentions raised. However, we have discovered an error in the abstracts of judgment that must be corrected as to each defendant. Accordingly, we shall affirm the judgments and direct the trial court to prepare corrected abstracts of judgment.

DISCUSSION

I

Double Jeopardy and Due Process

A. Background

Defendants initially were charged in case No. 07F19992.

November 6, 2008, was the last day to bring the case to trial, because none of the defendants had waived time. (See Pen. Code, § 1382.)[2] The People announced "ready" for trial, and the case was assigned to the first trial court.

When the trial court asked if the People had any matters to be heard, the People replied that they wanted the trial deemed "commenced" to avoid a speedy trial dismissal, and the parties agreed the trial had indeed commenced.[3] Later, the People conceded that Weathers had not been subpoenaed, but stated they would seek to have Weathers's prior testimony admitted. The trial court lifted the stay of a bench warrant for Robinson, who had been subpoenaed and failed to appear.

On November 12, the People moved in limine to introduce the preliminary hearing testimony of Weathers and Robinson, and the defense sought discovery of efforts made to locate them. The prior testimony could be admitted if and only the People showed those witnesses were "unavailable[,]" which turned on whether the People "exercised

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[2] Further date references are to 2008 unless otherwise specified. Further undesignated statutory references are to the Penal Code.

[3] For purposes of section 1382, providing a statutory speedy trial right, trial begins when elements "vital to undertaking a trial be present" and the parties are "'ready to proceed[.]'" (*People v. Hajjaj* (2010) 50 Cal.4th 1184, 1196-1197; see *Perryman v. Superior Court* (2006) 141 Cal.App.4th 767, 776 (*Perryman*) [trial begins "when jeopardy attaches . . . or when the litigation of contested issues otherwise begins"].) Had the trial not been deemed started at that time, the People would have had to show good cause for a continuance to secure their witnesses. (*Perryman, supra,* 141 Cal.App.4th at pp. 777-778.)

reasonable diligence" to ensure their appearance. (Evid. Code, §§ 240, subd. (a)(5), 1291, subd. (a)(2); see *People v. Bunyard* (2009) 45 Cal.4th 836, 849.)

On Thursday, November 13, the People stated a diligence report would be ready the next court day, Monday, but the defense objected and sought a "live" hearing on diligence. The trial court directed the clerk to have a panel of jurors available on Monday morning.

On Monday, November 17, after the People filed a fourth amended information, the trial court asked if there was "any matter" to address before jury selection, the People said there was not, and jury selection began. Later, defense counsel acknowledged receipt of discovery on diligence.

On Wednesday, November 19, the People presented to the court a deputy's testimony about efforts to find Robinson. Without objection, the trial court continued the diligence hearing to "the most convenient opportunity that we have after we either select the jury or during jury selection[.]" Jury selection continued that day.

On Thursday, November 20, the jurors and alternates were selected but not sworn. The People announced they had additional witnesses to present regarding diligence, and defense counsel referred to an earlier objection to the court's failure to swear the jury. The People's witnesses testified about efforts to locate Robinson and Weathers, and the trial court heard argument on the People's motion.

On Friday, November 21, after the People recalled one witness, the trial court found the People had not shown adequate diligence with respect to either Weathers or Robinson, and denied the People's motion to allow the witnesses' prior testimony to be introduced at trial.

On Monday, November 24, the People moved to dismiss the case for insufficiency of the evidence, in light of the trial court's evidentiary ruling. (See § 1385.)[4] One defense counsel objected that the dismissal should be with prejudice, alleging the People were "Judge shopping." Another defense counsel stated: "We objected to the lack of swearing in of the jurors . . . prior to the selection of the alternates, and we continue to believe that jeopardy should have attached last week[.]"

The trial court stated it had found "good cause not to swear the jury upon their selection, nor the alternates. [¶] The Court was well aware, as were all counsel, that the People were attempting in various ways to secure the presence of the victim, Lamont Weathers and . . . witness Beverly Robinson. [¶] We had not yet concluded the diligence hearing, so there was no firm evidence of what efforts had been discharged by the People in that regard. [¶] So the Court, with that scenario, found there was sufficient cause not to swear the jury." The trial court also stated it had been "anticipating" that the People might not show due diligence.

The trial court granted the motion to dismiss, and later thanked and excused the jurors.

The People refiled the charges on November 26; a second trial court presided over the refiled case.

Each defendant entered a plea of once in jeopardy, moved to dismiss raising due process and double jeopardy grounds, and later raised those issues in their new trial motions. The defense argued the first trial court should not have delayed swearing the jury to allow the People "time to fix the problems in their case" and then allow them to dismiss and refile after they failed to fix those problems. Instead of seeking a continuance before jury selection began (see fn. 3, *ante*), when the People "declared

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[4] Insufficient evidence is a valid ground for a section 1385 dismissal, as is a dismissal to allow the People to secure further witnesses. (See *People v. Hatch* (2000) 22 Cal.4th 260, 268-271; *People v. Orin* (1975) 13 Cal.3d 937, 946.)

ready, for all purposes, [they took] the risk that [they] would not be able to get [their] witnesses." As a result, defendants were subjected to increased incarceration and lost the opportunity to have that first jury "decide their fate with the evidence that was available to the People at the time, which . . . they admit was absolutely nothing."

The People's consistent response was that jeopardy had not attached, and that the first trial court "knew exactly what he was doing in not swearing [in] the jury. He was taking things in a certain order, well within [his] rights."

The second trial court denied the various defense motions, finding that jeopardy had never attached.[5]

B. Analysis

Before analyzing the specific defense contentions, we first review some general rules about double jeopardy.

"The Fifth Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment [citation]), protects defendants from repeated prosecution for the same offense [citations], by providing that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb. . . .'" (*People v. Batts* (2003) 30 Cal.4th 660, 678 (*Batts*).) The California Constitution contains a similar provision. (Cal. Const., art. I, § 15 ["Persons may not twice be put in jeopardy for the same offense"].)

In *Downum v. United States* (1963) 372 U.S. 734 [10 L.Ed.2d 100] (*Downum*), the parties "announced ready" but, after the jury was sworn, the prosecutor asked for it to be

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[5] We reject the People's claim that defendants were mounting an improper collateral attack on the first trial court's ruling. (Cf. *Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 950-952.) As defense counsel argued below, the second trial court had a duty to rule on the motions to dismiss, and was not merely reviewing the prior judge's rulings for error as such. By moving to dismiss, defendants preserved their claims. (See *Batts*, *supra*, 30 Cal.4th at p. 676 ["'a claim of double jeopardy is most appropriately raised by way of a pretrial motion to dismiss'"].)

discharged because a witness could not be found. The trial court discharged the jury, and later overruled a plea of former jeopardy. (*Downum, supra,* 372 U.S. at p. 735 [10 L.Ed.2d at p. 102].) In reversing the judgment, *Downum* endorsed a Ninth Circuit case on similar facts, holding "'The fact is that, when the district attorney impaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance. . . . The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict.'" (*Id*. at p. 737 [10 L.Ed.2d at p. 102], quoting *Cornero v. United States* (9th Cir. 1931) 48 F.2d 69, 71.)

Downum has been characterized as involving "a particularly unpardonable fault of the prosecutor--unpreparedness." (Schulhofer, Jeopardy and Mistrials (1977) 125 U.Pa.L.Rev. 449, 466.) A later high court case described *Downum* as involving "a defective procedure that would lend itself to prosecutorial manipulation" and where the procedure "operated as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case." (*Illinois v. Somerville* (1973) 410 U.S. 458, 464, 469 [35 L.Ed.2d 425, 431, 434].)

Thus, it is clear that *had the jury been sworn*, the People would not have been able to legally refile the charges after successfully moving to dismiss them, because double jeopardy principles prevent "a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict." (*Green v. United States* (1957) 355 U.S. 184, 188 [2 L.Ed.2d 199, 204-205] (*Green*); see *State v. Stani* (N.J. App. Div. 1984) 197 N.J. Super. 146, 151 [484 A.2d 341, 343] ["the State may not retreat from the field when its case turns sour and then be permitted to sally forth on a future day before a new jury when its case is refreshed and reinforced"].)[6]

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[6] Of course, if a judge learns a juror is unfit, or for other reasons it is impossible for the trial to continue, the jury must be discharged and a retrial is permitted for "manifest

We now address defendants' specific claims of error.

1. Abuse of Discretion

We accept, for purposes of argument, defendants' view that the first trial court abused its discretion by delaying swearing the jury for reasons extrinsic to jury selection.

By statute, after all parties have exercised or passed exercising peremptory challenges, "the jury shall then be sworn, unless the court, for good cause, shall otherwise order." (Code Civ. Proc., § 231, subds. (d) & (e).) The trial court's discretion to find such good cause "will not be set aside absent a clear showing of abuse." (*People v. Niles* (1991) 233 Cal.App.3d 315, 320-321 (*Niles*) [construing former § 1088] .) Further, the trial court has the inherent discretionary power "To provide for the orderly conduct of proceedings before it[.]" (Code Civ. Proc., § 128, subd. (a)(3); see *People v. Alvarez* (1996) 14 Cal.4th 155, 209.)

But discretion is always delimited by applicable legal standards, a departure from which constitutes an "abuse" of discretion. (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297-1298; see *County of Yolo v. Garcia* (1993) 20 Cal.App.4th 1771, 1778 ["the range of judicial discretion is determined by analogy to the rules contained in the general law and in the specific body or system of law in which the discretionary authority is granted"].)

Certainly a problem *regarding jury selection* would provide good cause to delay swearing a jury. (See *People v. DeFrance* (2008) 167 Cal.App.4th 486, 503-504 (*DeFrance*) ["There was a real, substantive and objective need to reopen jury selection"]; *Niles*, *supra*, 233 Cal.App.3d at pp. 320-321 [no abuse of discretion in denying request to

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necessity[.]" (*Wade v. Hunter* (1949) 336 U.S. 684, 689-690 [93 L.Ed. 974, 978-979]; see *Batts*, *supra*, 30 Cal.4th at p. 679.)

We note a disagreement about the scope of *Green* in the recent divided decision in *Blueford v. Arkansas* (2012) 566 U.S. ___ [182 L.Ed.2d 937; 132 S.Ct. 2044], after a sworn jury failed to return verdicts. That issue is not germane here.

reopen to allow peremptory challenge, because the facts about the seated juror had been known before]; *People v. Griffin* (2004) 33 Cal.4th 536, 564-567 (*Griffin*); accord, *In re Mendes* (1979) 23 Cal.3d 847, 851 (*Mendes*) [after jury proper--but no alternates--sworn, juror excused after she advised that her brother died during the night, and the parties were permitted to select another juror].)

But here, the *sole* reason for not swearing the jury was to avoid the rule of *Downum*, *supra*, 372 U.S. 734 [10 L.Ed.2d 100], because the first trial court anticipated it might rule against the People on their evidentiary motion.

The People provide no authority upholding delay in swearing a jury for reasons *unrelated to jury selection*.

Generally, a trial court abuses its discretion by basing a discretionary decision on improper factors. (See, e.g., *People v. Sandoval* (2007) 41 Cal.4th 825, 847; *People v. Carmony* (2004) 33 Cal.4th 367, 378.) Accordingly, we shall assume for purposes of argument that the first trial court abused its discretion by basing its decision on a factor unrelated to jury selection.

2. Double Jeopardy

Assuming the first trial court erred by not timely swearing the jury, the result did not violate double jeopardy *as such*.

The United States and California high courts apply a bright-line rule: In a jury trial, jeopardy attaches *when the jury is sworn*. (*Crist v. Bretz* (1978) 437 U.S. 28, 37-38 [57 L.Ed.2d 24, 32-33] (*Crist*); *People v. Riggs* (2008) 44 Cal.4th 248, 278, fn. 12 ["once a jury has been sworn, jeopardy has attached" for state and federal double jeopardy] (*Riggs*); *Curry v. Superior Court* (1970) 2 Cal.3d 707, 712 (*Curry*).)[7]

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[7] There may be a distinction between swearing the jury proper and swearing the alternates. (See *Griffin*, *supra*, 33 Cal.4th at pp. 565-566; *Mendes*, *supra*, 23 Cal.3d at pp. 852-856; cf. *People v. Cottle* (2006) 39 Cal.4th 246, 254-258; *DeFrance*, *supra*, 167 Cal.App.4th at p. 503.) Not surprisingly, the parties express differing views on that point.

Accordingly, the second trial court correctly concluded it was bound to overrule the pleas of former jeopardy, and deny the dismissal and new trial motions to the extent they were based solely on double jeopardy claims. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity Sales*).)

Defendants invite us to "fix jeopardy at the point where the jurors are indeed chosen, viewing the oath as an administrative technicality that has no bearing on the question of jeopardy, except, perhaps, where good cause [to delay swearing the jury] has actually been established and proved." They correctly contend that California courts may invoke independent state grounds to interpret the California Constitution's double jeopardy provision more broadly than the analogous federal provision. (See, e.g., *People v. Hanson* (2000) 23 Cal.4th 355; *People v. Fields* (1996) 13 Cal.4th 289, 297-298, 302 (*Fields*).)

However, our Supreme Court precedent fixes the point of attachment of jeopardy in a jury trial as the time when the jury *is* sworn, not the point it *should have been* sworn. (*Riggs*, *supra*, 44 Cal.4th at p. 278, fn. 12; *Curry*, *supra*, 2 Cal.3d at p. 712.) We are not free to change that rule. (See *Auto Equity Sales*, *supra*, 57 Cal.2d at p. 455.)

However, these conclusions about double jeopardy, in and of themselves, do not necessarily resolve defendant's *due process* claims.

3. Due Process

Defendants reimport from double jeopardy jurisprudence harms against which *that* doctrine protects, and claim that the *occurrence* of such harms deprived them of due process. First, they contend they were deprived of their right to be tried by the jury that had been selected and was ready to try the case. Second, analogizing to cases of outrageous governmental conduct and prosecutorial misconduct, they accuse the People

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As resolution of this issue is not necessary to our decision in this case, we need not and do not address it.

of manipulating the proceedings to secure a second opportunity to muster evidence against them. We are not persuaded by either claim.

Before addressing the specifics of these two defense claims, we outline some of the purposes served by the double jeopardy rule. Our Supreme Court has stated:

> "It prevents the state from having a second opportunity to marshal evidence which it failed to produce at the first opportunity. It reduces the risk that, by effectively lessening the People's burden of proof, an innocent person might be convicted. It protects an accused from the embarrassment, expense and ordeal of a second trial." (*Mendes*, *supra*, 23 Cal.3d at p. 855.)

The rule also ensures "that the defendant's right to have his fate decided by the first jury empaneled is protected[.]" (*Weston v. Kernan* (9th Cir. 1995) 50 F.3d 633, 636 (*Weston*).)[8]

We now address defendants' due process claims separately.

a. Right to a Particular Jury

Precedent holds that the right to be tried by the particular jury that has been selected is protected by double jeopardy principles. (See *Crist*, *supra*, 437 U.S. at p. 36 [57 L.Ed.2d at pp. 31-32] [referring to the "strong tradition that once banded together a jury should not be discharged until it had completed its solemn task of announcing a verdict"]; *Downum*, *supra*, 372 U.S. at p. 736 [10 L.Ed.2d at p. 102] [referring to the "valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him" but explaining such right "may be subordinated to the public interest--when there is an imperious necessity to do so"]; but see *Arizona v. Washington* (1978) 434 U.S. 497, 505 & fn. 16 [54 L.Ed.2d 717, 728] ["a rigid application of the 'particular tribunal' principle is unacceptable" and departing from the ideal does "not invariably create unfairness"].)

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[8] Other purposes served by the doctrine have been mentioned, but are not relevant to this appeal. (See, e.g., *Fields*, *supra*, 13 Cal.4th at pp. 298-299; *Weston*, *supra*, 50 F.3d at p. 636.)

However, in these and similar cases, the courts were referring to juries that had been selected *and sworn* and did not suggest the "particular jury" interest extends any further.

For example, our Supreme Court has held that "a criminal defendant *who is in the midst of trial* has an interest . . . in having his or her case resolved by *the jury that was initially sworn to hear the case*--and in potentially obtaining an acquittal from that jury. [Citation & fn.] It also follows that in certain circumstances, conduct by the prosecution or the court that results in mistrial, thereby terminating the trial prior to resolution by the jury, may impair that aspect of a defendant's protected 'double jeopardy' interest." (*Batts, supra,* 30 Cal.4th at p. 679, emphases added.) And, when addressing cases discussing the "'particular tribunal' or 'chosen jury'" issue, the high court observed "these cases do no more than determine that jeopardy attaches once a jury and alternates are chosen [citation], and that granting an unnecessary mistrial bars retrial [citation]. They do not stand for the proposition that defendant becomes immune from further prosecution merely because one particular juror is improperly discharged, an alternate substituted, and an actual verdict duly entered." (*People v. Hernandez* (2003) 30 Cal.4th 1, 8 (*Hernandez*).)

Here, defendants were not in the "midst of trial" because they were never placed in jeopardy. Nor do they claim there was anything relatively favorable to them about the first jury, or relatively unfavorable to them about the second juries.[9] Instead, defendants claim that, having completed jury selection, they had the abstract right to have *that jury* and no other decide their fate, based on then-extant evidence.

However, precedent holds that the right to a "particular" jury applies when and only when a jury has been sworn, and jeopardy has actually attached. (See *Hernandez,*

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[9] The jury trial ultimately was conducted with two juries, one for Presley and one for the Whitakers, for reasons irrelevant to this discussion.

supra, 30 Cal.4th at p. 8; *Batts*, *supra*, 30 Cal.4th at p. 679.) We are not free to expand that rule. (See *Auto Equity Sales*, *supra*, 57 Cal.2d at p. 455.) Accordingly, we must reject the claim that defendants had a due process right to have the first jury decide their fate, before jeopardy had actually attached.

b. Governmental Misconduct

We agree with defendants that the People improperly announced "ready" before commencing jury selection, without knowing whether their key witnesses were available, instead of seeking a continuance. (See fn. 3, *ante*.) However, this impropriety does not show intentional manipulation of the proceedings, as opposed to ignorance or neglect. Further, any error was not structural, and defendants fail to show any prejudice flowing from the dismissal and refiling of the charges.

The "extreme" double jeopardy cases are those "in which a prosecutor requests a mistrial in order to buttress weaknesses in his evidence. Although there was a time when English judges served the Stuart monarchs by exercising a power to discharge a jury whenever it appeared that the Crown's evidence would be insufficient to convict,[Fn.] the prohibition against double jeopardy as it evolved in this country was plainly intended to condemn this 'abhorrent' practice." (*Arizona v. Washington*, *supra*, 434 U.S. at pp. 507-508 [54 L.Ed.2d at p. 729].)

Here, the People dismissed the first case *before* jeopardy attached. A prosecutorial dismissal, "if entered before jeopardy attaches, neither operates as an acquittal nor prevents further prosecution of the offense." (*Bucolo v. Adkins* (1976) 424 U.S. 641, 642 [47 L.Ed.2d 301, 303]; see 1 Torcia, Wharton's Crim. Law (15th ed. 1993) Defenses, § 61, pp. 455-456.)

One learned treatise would add a caveat to this rule: "Although jeopardy attaches in a jury trial only after jury selection is complete and the judge has sworn the entire jury . . . pre-jeopardy attempts to terminate the trial and start over may deny a defendant due

process *in egregious circumstances*." (6 LaFave, et al., Crim. Proc. (3d ed. 2007) Double Jeopardy, § 25.1(d), p. 588, emphasis added.) And a commentator suggests that the rule that jeopardy attaches when jury is sworn or first witness in court trial testifies "overlooks the very real possibility that successive indictments, though dismissed before trial, may be used as instruments of oppression and may be nearly as vexatious to the defendant as a series of trials." (Comment, Twice in Jeopardy (1965) 75 Yale L.J. 262, 263, fn. 3.) Accordingly, we shall assume but do not hold that prosecution after a pre-jeopardy dismissal might be barred in "egregious circumstances."

By analogy, defendants refer to cases that address the doctrine of "outrageous" government conduct, flowing from due process fairness grounds. (See *People v. Smith* (2003) 31 Cal.4th 1207, 1223-1227 [declining to decide viability of doctrine]; *People v. Wesley* (1990) 224 Cal.App.3d 1130, 1142 [California has "come very close" to applying the doctrine]; *People v. Peppars* (1983) 140 Cal.App.3d 677, 685-687; see generally, 1 Witkin & Epstein, Cal. Crim. Law (3d ed. 2000) Defenses, § 102, pp. 442-444 [describing the muddled caselaw] (*Witkin*).) *If viable,* the doctrine is short in reach:

> "When conduct on the part of the authorities is so outrageous as to interfere with an accused's right of due process of law, proceedings against the accused are thereby rendered improper. [Citations.] Dismissal is, on occasion, used by courts to discourage *flagrant and shocking misconduct by overzealous governmental officials* in subsequent cases." (*Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, 429, emphasis added.)

Nothing the People did in this case reflects "flagrant and shocking misconduct[.]" The fact their efforts to find key witnesses were found by the first trial court to fall short of satisfying the diligence required under Evidence Code sections 240 and 1291, does not mean the People acted with an *improper motive*.

Further, as defendants concede, had the first trial court declined to delay swearing the jury until the conclusion of the People's evidentiary motion, the People could have immediately moved to dismiss their case against defendants, and refiled it if and when

they were able to secure their witnesses. Defendants turn this point around and argue: "Thus, the People made a tactical choice and engaged in gamesmanship from the beginning: they took a risk, and bluffed, and lost." But this does not change the fact that it was within the People's power to move to dismiss *before* jury selection. The fact that the People participated in jury selection while their evidentiary motion was pending does not reflect flagrant or shocking misconduct.

The defense analogy to cases where a prosecutor *provokes a mistrial* fares no better, because the remedy in such cases is a subsequent fair trial, not dismissal of the charges.

Two mistrial rules apply in California. The first, compelled by federal precedent, provides that, "If a motion for mistrial is granted on the basis of prosecutorial misconduct, the Double Jeopardy Clause does not preclude a retrial unless the prosecutor intentionally provoked the mistrial." (1 Witkin, *supra*, Defenses, § 127, p. 474; see *Oregon v. Kennedy* (1982) 456 U.S. 667 [72 L.Ed.2d 416].) The second, based on independent state grounds, bars a retrial if a prosecutor commits misconduct to thwart a looming acquittal, "if a court, reviewing all of the circumstances as of the time of the misconduct, finds not only that the prosecution believed that an acquittal was likely and committed misconduct for the purpose of thwarting such an acquittal, but also determines, from an objective perspective, that the prosecutorial misconduct deprived the defendant of a reasonable prospect of an acquittal." (*Batts*, *supra*, 30 Cal.4th at pp. 665-666; see *id.*, at pp. 695-697.)

But *Batts* emphasized that "the normal and usually sufficient remedy for the vast majority of instances of prejudicial prosecutorial misconduct that occur at trial is provided under the federal and state *due process* clause, and calls for either a declaration of mistrial followed by retrial, or a reversal of a defendant's conviction on appeal followed by retrial. The remedy mandated by the double jeopardy clause--an order barring retrial and leading to the dismissal of the criminal charges against the defendant

without trial--is an unusual and extraordinary measure that properly should be invoked only with great caution." (*Batts, supra,* 30 Cal.4th at p. 666; see *Sons v. Superior Court* (2004) 125 Cal.App.4th 110, 121 (*Sons*) ["misconduct, even flagrant misconduct, ordinarily is corrected by a fair retrial"].)

Nor have defendants established that this is a case calling for per-se reversal. In cases of federal constitutional error (*Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705] (*Chapman*)), per-se reversal is reserved for "structural" flaws, such as "the total deprivation of the right to counsel at trial, a biased judge, unlawful exclusion of members of the defendant's race from a grand jury, denial of the right to self-representation at trial, and denial of the right to a public trial." (*People v. Flood* (1998) 18 Cal.4th 470, 493; see *People v. Aranda* (2012) 55 Cal.4th 342, 363-365.) "If, on the other hand, '"the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis."'" (*People v. Mil* (2012) 53 Cal.4th 400, 410.)

But in this case, the assumed error in failing to promptly swear the first jury is based on the *state-law procedural rule* that a jury should be sworn promptly after selection. (See Part I-B-1, *ante*.) It was not federal constitutional error.

Thus, defendants must show actual prejudice, which they fail to do. Apart from the contentions raised and resolved adversely to them in the unpublished portion of this opinion (Part II, *post*), and the double jeopardy claims we have already rejected, defendants do not contend the second trial was unfair.

We acknowledge that defendants had to undergo two preliminary hearings. But each defendant had appointed counsel for both cases and they do not claim they suffered any increased financial costs because of the dismissal and refiling of charges.[10] Further,

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[10] Defendants each retained counsel after the jury verdicts, and before sentencing. But defendants do not claim they suffered any additional financial costs because of the dismissal of the first case itself.

there is no claim that they failed to receive full presentence custody credits for any additional jail time as a result of any delay.

Finally, in arguing for reversal, defendants also analogize to statutory speedy trial cases. But in such cases, even where the People have failed to act with diligence, an error in finding good cause is reversible *if and only if the defendant shows a miscarriage of justice at the ensuing trial*. (*People v. Martinez* (2000) 22 Cal.4th 750, 769; *People v. Rodriguez* (1971) 15 Cal.App.3d 481, 484-485; cf. *Perryman, supra,* 141 Cal.App.4th 767 [*pretrial* writ relief].)

Thus, the second jury trial cured any harm caused by the People's impropriety in announcing "ready" when they were not ready, or by any error in the first trial court's delaying swearing the jury for reasons extrinsic to jury selection. (See *Batts, supra,* 30 Cal.4th at p. 666; *Sons, supra,* 125 Cal.App.4th at p. 121.)

c. Conclusion

Even assuming the first trial court erred in delaying swearing the jury, the result was neither a double jeopardy violation nor a due process violation. And even if we were to find the People engaged in some form of misconduct, no structural error occurred and defendants have not shown that any prejudice flowed from any misconduct. Therefore, there is no basis to reverse defendants' convictions that followed their jury trial.

II

Defendants' Remaining Contentions

We now describe the background leading to defendants' convictions, and discuss and reject their remaining contentions.

A. Background of Case No. 08F09616

1. Trial Evidence

Weathers, age 38 at trial, testified he had known Whitaker since they were 16. In December 2007, Weathers "sucker punched" Whitaker in the jaw. About two weeks

later, on December 27, 2007, Weathers was attacked by "Wheezy" (Presley), who split Weathers's head. As Weathers struggled with Presley, Whitaker III approached with a long gun. Weathers pushed the gun barrel away, and "that's when he fired on me." Weathers woke up in the hospital. Whitaker's sister, Gwendolyn Davis, had Weathers sign a letter seeking to retract the charges.[11] Weathers thought the attack was in retaliation for his earlier fight with Whitaker. Weathers had identified photographs of Whitaker III as showing the person with the gun, Presley as the person hitting him, and Whitaker as the person he had recently punched.

At the hospital, Weathers told a deputy three men attacked him, including "James Whitaker" (as the deputy had recorded the name) and "Wheezy," who Weathers thought was "James Whitaker's" son, Weathers thought both of these men were "East Side Piru," and "James Whitaker" had told Weathers he had "disrespected him in front of some people," and had told him "I'm going to do something to you[.]"

A neighbor, David Penn, testified he saw two people fighting with Weathers. The taller attacker had a long rifle pointed to Weathers's head, and Weathers was holding the rifle barrel. The taller man tried to chamber a round, then turned the rifle around and clubbed Weathers with the butt several times "Like a golf club[,]" then the two men fled. Penn testified exhibit 51 (in two parts, marked 51-A and 51-B) looked like the rifle he saw the men use, and which broke "after the last hit[.]" Penn had identified the shorter of the two men at a field showup shortly after the incident, but he could not identify that man in court. Deputy Kristen Cook testified Penn had identified Presley.

Constance Goins, Whitaker's sister, denied knowing or having said anything about what happened, but admitted Whitaker was upset at Weathers for breaking his jaw.

Beverly Robinson, also Whitaker's sister, testified she told a deputy what she had heard from others, and denied making specific statements to a detective.

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[11] Davis testified Weathers had asked her to write that letter because he was illiterate.

However, Detective Nathan Wise testified he spoke with Robinson on May 22, 2008, and she said people (including her sister, Goins) were mad at her for speaking to the police and wanted her to change her story. Robinson told him she was angry at Whitaker for making her nephew Whitaker III "do his dirty work" for him. Robinson said Whitaker told her son (Kevin Davis) that he had a gun and needed help "handling" Weathers, and Whitaker "might not make it back[.]" Robinson said Whitaker told Whitaker III and Presley "they had to do this for East Side Piru" and the men left after Whitaker "was giving them liquor and pumping them up" shortly before the shooting. Robinson said that Whitaker had told people Robinson was "snitching," and when Robinson had left the courtroom earlier, Detective Wise overheard her say she could not live in Rancho Cordova anymore.

Deputy Charles Gailey testified he spoke to Robinson the day after the incident. Robinson said the police caught two people, but Whitaker got away, and she was mad that he had involved her nephew in the incident. She had been with all three defendants the night before, and Whitaker "hyped them up and talked them into doing his dirty work" for him. Deputy Gailey also spoke with Kevin Davis, who told him the defendants had been drinking together, Whitaker "is a coward and he hyped the other two up and got them to fight his battle" and Whitaker said he had a "chopper" (a gun), and might not make it back.[12]

Deputy Ian Carver found unfired rifle cartridges and one fired casing near where Weathers was found unconscious. Carver's canine partner "Ike" found Whitaker III and Presley nearby. Another officer testified Whitaker III wore red and black clothing with a "P" on the belt, as typically worn by East Side Piru gang members. Another officer

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[12] Davis testified he was not with any of the defendants the day before he spoke to a deputy, and he denied making the various statements to the deputy.

found the rifle about a quarter of a mile away in some bushes, near where the two later-detained men had jumped a fence.

A criminalist testified the rifle found nearby could have been used to "cycle" the cartridges found at the scene, but because of the rifle's poor condition, he was not able to fire it and determine for sure. The barrel was bent and the stock had blood spatters on it, consistent with the rifle having been used as a bludgeon.[13]

Detective Burk Stearns testified about his gang expertise. He had particular experience with the East Side Piru, one of the Blood subsets in Rancho Cordova. It was common for East Side Piru members to wear red clothing, and have a "P" on their belts. They strived for respect and reputation, and retaliated against those that impaired their goals. It was important for a member to "[put] in work" for the gang, such as by committing an assault for another gang member. Gang activities included drug sales, homicides, vehicle thefts, assaults, and robberies. Gang violence discouraged victims or witnesses from reporting gang activities or testifying about them.

Stearns "validated" Presley ("Wheezy") as an East Side Piru member based on his arrest while in possession of narcotics and a loaded gun, a "'Chedda Boys'" tattoo (which referred to a subset of the East Side Piru gang), his association with the Whitakers, and his fight with a rival Crip member while in jail.[14] Stearns validated Whitaker III ("Little G") as an East Side Piru member, based on gang tattoos, clothing, the "P" belt buckle, associating with the other defendants, and information from other law enforcement sources.[15] Stearns validated Whitaker ("G") as an East Side Piru member based on the

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[13] Presley's jury heard testimony that Presley's DNA was not found on the rifle.

[14] In testimony before the Presley jury, Stearns also referred to documents from Presley's jail cell referring to "Chedda Boys" and other gang subjects.

[15] The trial court excluded on *Miranda* grounds (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694]) a statement by Whitaker III admitting he was a gang member, and also refused to allow the gang expert to rely on that statement. We express no view on the propriety of the latter ruling.

instant crimes, a prior incident involving drug sales while wearing gang clothing in a gang area, and other times Whitaker had worn gang clothing. In response to a hypothetical based closely on the facts of this case, Detective Stearns opined the incident would be gang-related. The younger assailants would be putting in work toward enhancing their gang status, and the gang would benefit by signaling that its members cannot be attacked. In response to a further question, based on an older gang victim's instructions to younger gang members to retaliate, Stearns testified this would bolster his opinion that the later attack was gang related.

Detective Stearns was present when Robinson told Detective Wise that she heard Whitaker tell her son (Davis) that Whitaker had a gun and needed help "handling" Weathers. She also said people were "getting on" her for talking to the police, but it was not right for Whitaker to make his son do his dirty work. Robinson's sister (Goins) had told Robinson to change her story. Robinson said Whitaker said he might not make it back, he gave the other defendants liquor, and told them they had to do it for East Side Piru.

2. Argument, Verdicts and Sentences

Presley's counsel partly argued he was intoxicated and that he did not have the intent for aider liability.

Whitaker III's counsel emphasized Weathers's intoxication, bias, head injury, prior felony conviction, and status as a drug dealer, to show a reasonable doubt about his identification of Whitaker III as one of his assailants.

Whitaker's counsel argued Weathers lied.

The "Whitaker" jury found Whitaker guilty of attempted premeditated murder, found he committed the crime to benefit of a criminal street gang (§§ 664/187, subd. (a), 186.22, subd. (b)(1)), but failed to reach verdicts on pendant firearm allegations, later impliedly dismissed. The jury also found him guilty of assault with a firearm and battery causing serious bodily injury (§§ 245, subd. (a)(2), 243, subd. (d)) but failed to reach

verdicts on pendant gang allegations, later impliedly dismissed. The trial court found he had a 1992 second degree robbery conviction--a serious felony and strike (§§ 211, 667, subds. (a), (b)-(i), 1170.12)--and sentenced him to prison for an unstayed term of life (with a parole eligibility period of 14 years) plus five years. Whitaker timely filed his appeal.

The "Whitaker" jury also found Whitaker III guilty of attempted premeditated murder, found he personally used a firearm and inflicted great bodily injury (§§ 664/187, subd. (a), 12022.53, subd. (b), 12022.7), but failed to reach verdicts on pendant gang allegations, later impliedly dismissed. The jury also found him guilty of assault with a firearm and battery causing serious bodily injury (§§ 245, subd. (a)(2), 243, subd. (d)) with various findings, but sentences imposed on those counts were stayed. The trial court sentenced Whitaker III to an unstayed prison term of life (with a parole eligibility period of seven years) plus 13 years. Whitaker III timely appealed.

Presley's jury found him guilty of attempted premeditated murder, found he personally inflicted great bodily injury, committed the crime to benefit a gang, and that a principal personally used a firearm. (§§ 664/187, subd. (a), 12022.7, subd. (a), 186.22, subd. (b)(1); see § 12022.53, subd. (e).) The jury also found him guilty of assault with a firearm and battery causing serious bodily injury (§§ 245, subd. (a)(2), 243, subd. (d)), with various findings, sentences on which were stayed. The court sentenced him to an unstayed prison term of life (with a parole eligibility period of seven years) plus 13 years. Presley timely appealed.

B. CALCRIM No. 400

Defendants contend CALCRIM No. 400, as given to each jury in this case, is defective because it refers to an aider and abettor being "equally guilty" with the principal. We deem this contention to be forfeited, and further conclude that any error was harmless.

CALCRIM No. 400, as given in this case, provided: "A person may be guilty of a crime in two ways. One, he may have directly committed the crime. I will call that person the perpetrator. Two, he may have aided and abetted a perpetrator, who directly committed the crime. A person is equally guilty of the crime whether he committed it personally or aided and abetted the perpetrator who committed it.

We previously have held that the failure to request a modification to this instruction in the trial court forfeits the precise contention raised in this appeal:

> "Generally, a person who is found to have aided another person to commit a crime *is* 'equally guilty' of that crime. [Citation.]
>
> "However, in certain cases, an aider may be found guilty of a greater or lesser crime than the perpetrator. [Citations]
>
> "Because the instruction as given was generally accurate, but potentially incomplete in certain cases, it was incumbent on [defendants] to request a modification if [they] thought it was misleading on the facts of this case. [Their] failure to do so forfeits the claim of error." (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118-1119 (*Lopez*); see also *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163-1165.)

We adhere to the views we expressed in *Lopez* (which rejected contrary views expressed in *People v. Nero* (2010) 181 Cal.App.4th 504, relied on by defendants herein) and conclude the claim has been forfeited.[16]

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[16] During deliberations, the Whitaker jury asked if was possible "to convict the [perpetrator] of the main crime and to convict the other defendant of aiding and [abetting] the lesser included offense?" The trial court replied: "In this case you are charged to determine the guilt or innocence of two separate defendants. You have been given separate verdict forms relating to each defendant, setting forth the questions you must answer as they relate to each defendant. [¶] You must separately consider the evidence as it applies to each defendant, and decide each charge for each defendant separately." Contrary to Whitaker's claim, this does not avoid forfeiture because no modification to CALCRIM No. 400 was sought. Moreover, the reply accurately emphasized that the jury had to determine each defendant's liability separately, further undermining the claim that CALCRIM No. 400 would have been misinterpreted, at least as to the Whitaker jury.

Moreover, the trial court instructed each jury with CALCRIM No. 401, which told each jury that aider liability required the People to prove a defendant knew of the perpetrator's purpose and shared the perpetrator's intent. And defendants do not claim any error in the instructions defining the intent required for the substantive charges. Because we presume the juries would correlate the various instructions (see *People v. Sanchez* (2001) 26 Cal.4th 834, 952), they would not have used the "equally guilty" language to truncate their duty to determine each defendant's intent. Thus, any error in the "equally guilty" language was harmless. (See *Lopez, supra,* 198 Cal.App.4th at pp. 1119-1120.)

C. CALCRIM No. 371

Defendants Whitaker contend the trial court did not properly instruct their jury on third-party efforts to dissuade witnesses, as provided by one portion of a pattern instruction, CALCRIM No. 371. We disagree.

The trial court gave CALCRIM No. 371 in part as follows:

> "[I]f a defendant tried to hide evidence, that conduct may show that he was aware of his guilt. If you conclude that a defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself.
>
> "If you conclude that a defendant tried to hide evidence, you may consider that conduct only against that defendant. You may not consider that conduct in deciding whether any other defendant is guilty or not guilty."

Whitaker III objected to any instruction on suppression of evidence, but the trial court concluded the evidence the rifle was found in some bushes supported the instruction. Defendants do not challenge that conclusion on appeal. Instead, the Whitakers point to evidence of efforts to get Weathers and Robinson to retract their inculpatory statements, and the absence of evidence linking the Whitakers to *those* efforts to suppress evidence. They contend "the trial court failed to protect [them] by instructing

the jury with Alternative C to CALCRIM [No.] 371, the pattern charge where a third party attempts to conceal evidence against a defendant."

Accordingly, their claim is not that the instruction given was wrong, but that it was *incomplete*. However, "A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Lang* (1989) 49 Cal.3d 991, 1024; see *Lopez*, *supra*, 198 Cal.App.4th at pp. 1118-1119.)

It is particularly appropriate to apply the forfeiture rule in this case, because in overruling the defense objection to the portion of CALCRIM No. 371 that *was* given, the trial court explicitly outlined the other alternatives provided by the pattern instruction, including "one dealing with suppression of witness testimony" and found them to be factually inapplicable. If defense counsel thought there was a likelihood any juror would draw an improper inference on this point, that was the time to object, yet counsel failed to do so.

Further, the instruction the Whitakers belatedly request provides as follows: "If someone other than the defendant tried to create false evidence, provide false testimony, or conceal or destroy evidence, that conduct may show the defendant was aware of his guilt, but only if the defendant was present and knew about that conduct, or, if not present, authorized the other person's actions." (CALCRIM No. 371.)

But, as the People point out, there was no evidence linking the Whitakers to the alleged efforts to get Weathers and Robinson to retract, and the Whitakers do not contend the prosecutor *argued* they were responsible for such efforts. We see no reason the jury would have speculated the Whitakers were responsible for such conduct, even in the absence of an instruction not to do so.

Accordingly, we reject the claim of prejudicial error.[17]

D. Expert Gang Testimony

Defendants contend Detective Stearns, the prosecution's gang expert, improperly gave ultimate issue testimony and improperly referred to them personally in answering hypothetical questions. We find no error.

Detective Stearns testified at an in limine hearing (see Evid. Code, § 402) about his gang expertise, including with the Rancho Cordova East Side Piru Blood gang. "Little Gene" (Whitaker III) was a member, as shown by his juvenile record, tattoos, and clothing. "Big G" (Whitaker) was a member, based on clothing, prior arrests, and this incident. So was "Wheezy" (Presley), based on tattoos, self-admissions, arrest history, and associations. This incident was gang related.

At trial, Detective Stearns was asked hypothetical questions, as we have summarized *ante*. The trial court twice admonished the jury about an expert's ability to rely on hearsay material, and admonished that the gang evidence could not be used to show criminal propensity. In addition to these admonishments, the juries were instructed on the proper use of expert evidence and hypothetical questions (see CALCRIM Nos. 332, 1403), and defendants do not fault these instructions or admonishments as such.

In Detective Stearns's opinion, the younger assailants would be working toward enhancing their gang status, at the behest of the older gang member who had been attacked, and the gang as a whole would benefit by signaling that its members cannot be attacked without retaliation.

In contending Detective Stearns's testimony should have been excluded, defendants generally rely on a broad interpretation of *People v. Killebrew* (2002) 103

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[17] Whitaker III also asserts the purported error lightened the People's burden of proof. But because he presents no developed analysis, we deem this point to be forfeited. (See *People v. Harper* (2000) 82 Cal.App.4th 1413, 1419, fn. 4.)

Cal.App.4th 644 (*Killebrew*), asserting that it holds a gang expert cannot answer hypothetical questions about intent. (AOB 73, 79; ARB 27-28) We disagree.

Our Supreme Court has rejected *Killebrew*, to the extent it can be read so broadly. (*People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*) [in part clarifying and in part disapproving *Killebrew*]; see also *People v. Gonzalez* (2006) 38 Cal.4th 932, 946, fn. 3 ["It would be incorrect to read *Killebrew* as barring the questioning of expert witnesses through the use of hypothetical questions regarding hypothetical persons"]; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512–1513.) "To the extent that *Killebrew*, *supra*, 103 Cal.App.4th 644, was correct in prohibiting expert testimony regarding whether the *specific* defendants acted for a gang reason,[fn.] the reason for this rule is *not* that such testimony might embrace the ultimate issue in the case. 'Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.' [Citations.] Rather, the reason for the rule is similar to the reason expert testimony regarding the defendant's guilt in general is improper." (*Vang*, *supra*, 52 Cal.4th at p. 1048.)

Defendants complain that Detective Stearns referred to "the older defendant" who directed "the two younger defendants," and also referred to one "individual" who said, "This is on East Side Piru[.]" Their point is that these specific references effectively eliminated the hypothetical nature of the expert testimony.

However, as the People point out, no objection to this nomenclature was lodged. In any event, the juries would understand the expert was speaking hypothetically.

Moreover, it was proper to tether the hypothetical closely to the facts, indeed, it was *essential* to do so: "[H]owever much latitude a party has to frame hypothetical questions, the questions must be rooted in the evidence of the case being tried, not some other case. [¶] The reason for this rule should be apparent. A hypothetical question not based on the evidence is irrelevant and of no help to the jury." (*Vang*, *supra*, 52 Cal.4th at p. 1046.) To preclude a hypothetical question because it is thinly disguised from the

actual facts "transforms the *requirement* that a hypothetical question be rooted in the evidence into a *prohibition*--or at least into the confounding rule that the party posing the question must disguise from the jury the fact it is rooted in the evidence--and not 'thinly,' it appears, but thickly." (*Vang, supra*, at p. 1046.)

Defendants also fault Detective Stearns for trying "to sneak in an inadmissible opinion" by referring to "a prior incident between G and the victim." But the trial court sustained a prompt objection, and the prosecutor directed the witness to stay "within the hypothetical[.]" This stray passage does not support the claim that Detective Stearns acted with improper motives in testifying.

Finally, defendants cursorily contend the evidence violated federal due process. We disagree. "Only if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.' [Citation.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose." (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920; see *People v. Partida* (2005) 37 Cal.4th 428, 439.) Defendants claim that *because* the evidence was inadmissible under state law, its introduction violated due process. However, as we have explained, as admission of the evidence did not violate *state* law, defendant's federal claim fails.

E. CALCRIM No. 370

Whitaker and Presley fault the trial court's use of the pattern instruction (CALCRIM No. 370) stating the People need not prove motive, contending it undermined the instruction that required the People to prove they committed the underlying crime for the benefit of a gang. We find no error.

CALCRIM No. 370 as given in this case stated: "The People are not required to prove that the defendant had a motive to commit any of the crimes charged. In reaching your verdict you may, however, consider whether the defendant had a motive. [¶]

Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty."

The trial court gave the pattern instruction (CALCRIM No. 252) on the union of act and intent, and specified which charges "require a specific intent and/or mental state" and stated "the act and the specific intent and/or mental state required are explained in the instruction for that crime or allegation." The trial court also gave the pattern instruction (CALCRIM No. 1401) specifying what the jury had to determine in order to find the gang enhancement to be true, including determining whether "The defendant intended to assist, further or promote criminal conduct by gang members."

Defendants rely on an expansive reading of *People v. Maurer* (1995) 32 Cal.App.4th 1121 (*Maurer*). However, the holding of *Maurer* is quite narrow, as explained by *People v. Fuentes* (2009) 171 Cal.App.4th 1133 (*Fuentes*).

Maurer involved annoying or molesting a child as proscribed by section 647.6. The jury was instructed it had to find Maurer's conduct was "'motivated by an unnatural or abnormal sexual interest in'" the victim, but also was instructed that motive was not an element of the crime. (*Maurer, supra,* 32 Cal.App.4th at p. 1125.) We found the trial court erred in giving these conflicting instructions. We explained that while motive is not generally an element, "section 647.6 is a strange beast." (*Maurer, supra,* at p. 1126.) Prior cases had held that the acts forbidden by a predecessor statute (former § 647a) were acts motivated by an unnatural sexual interest in children. (See *In re Gladys R.* (1970) 1 Cal.3d 855, 867-869; *People v. Pallares* (1952) 112 Cal.App.2d Supp. 895, 900-902.) Thus, *to that limited extent*, we held "motive" *is* an element of section 647.6, and instructing that motive need not be proven was error. (*Maurer, supra,* 32 Cal.App.4th at p. 1127.)

Section 186.22, subdivision (b)(1), defines an enhancement for crimes "committed for the benefit of, at the direction of, or in association with a criminal street gang, with

the specific intent to promote, further, or assist in any criminal conduct by gang members." Unlike the crime at issue in *Maurer*, it does not provide that motive is an element.

Fuentes rejected an analogous claim that CALCRIM No. 370 conflicted with the instructions on a substantive gang offense (§ 186.22, subd. (a)) and gang-murder special circumstance (§ 190.2, subd. (a)(22)), which required similar findings of the intent to further gang activities. (*Fuentes*, *supra*, 171 Cal.App.4th at p. 1139.) *Fuentes* explained: "An intent to further criminal gang activity is no more a 'motive' in legal terms than is any other specific intent. We do not call a premeditated murderer's intent to kill a 'motive,' though his action is motivated by a desire to cause the victim's death. Combined, the instructions here told the jury the prosecution must prove that Fuentes intended to further gang activity but need not show what motivated his wish to do so. This was not ambiguous and there is no reason to think the jury could not understand it." (*Fuentes*, *supra*, at pp. 1139-1140.)

We agree with *Fuentes*. The jury here was instructed on the intent necessary for the gang enhancements. CALCRIM No. 370, informing the jury that motive need not be proven, did not conflict with those instructions. Defendants essentially seek to equate motive with intent. However, to adopt such a construction would mean that motive is an element of all crimes involving a specific intent. But, as we explained in *Maurer*, it is unusual for a crime to include motive as an element. (*Maurer*, *supra*, 32 Cal.App.4th at p. 1126.) The gang charges here did not include "motive" as an element.

We find no error in the trial court's instructing the jury with CALCRIM No. 370.[18]

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[18] We similarly reject the alternate claim that CALCRIM No. 370 lightened the People's burden of proof *because* it undermined the instructions on elements of the gang charge.

We disregard Whitaker's reference to a depublished opinion of this court. (*People v. Horvath* (C063198, March 12, 2012), ordered not to be published June 13, 2012.)

F. Abstract Correction

Whitaker presents a seven-page argument complaining that one verdict form contains an error. However, he concedes the verdict as announced in open court and recorded in the clerk's minutes is accurate and that the relevant sentence is accurate, and he does not claim that the abstract of judgment is wrong. The People agree that no correction is necessary. Because Whitaker concedes the minutes and the abstract accurately capture all components of the jury's verdict and the trial court's sentence, there is nothing for us to correct in this regard. (Cf. *People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Zackery* (2007) 147 Cal.App.4th 380, 385-389.)

However, each of the abstracts contains a different mistake. As to each defendant, the trial court properly imposed a life sentence, with possibility of parole, for the attempted premeditated murder counts. (See § 664, subd. (a).) (RT 2278, 2287, 2300) The trial court also properly stated on the record each defendant's minimum parole eligibility date, seven years for Whitaker III and Presley, and 14 years (due to a strike) for Whitaker. (§ 3046; see *People v. Jefferson* (1999) 21 Cal.4th 86, 91, 101-102, fn. 3.) However, the abstracts of judgment mistakenly refer to this component of each sentence as "7 years to life" or "14 years to life." The abstracts should be corrected to reflect the trial court's actual sentence for these counts, that is, life with possibility of parole, and should separately state the minimum parole eligibility period.

G. Vicarious Arming Instruction and Argument

Presley contends the trial court should not have added an instruction on vicarious arming and reopened arguments after his jury began deliberations. This argument fails to persuade.

During deliberations, Presley's jury sent a note on a Friday asking in part "Is it true that on the offense of personal use of a firearm, we cannot use the argument of aiding and abetting?" The trial court sent a written reply indicating it would not answer the question without consulting counsel, advising the jury not to speculate about the answer

until all counsel could be contacted, and promising "should you determine to recess your deliberations due to this fact it will be promptly addressed on Monday."[19] Later that day, the jury asked for some testimony to be read back.

The following Monday, the court reporter read back the requested testimony. Then the trial court and counsel discussed how to answer the remaining jury question. The trial court told the jury that "your understanding is correct" and that the jury had to find that Presley "personally used a firearm." The court referred the jury to CALCRIM No. 3146, already in the jury's instructional "packet," which defined personal use of a firearm during the commission of the charges.

However, the trial court then reinstructed the jury--over Presley's objection--with CALCRIM No. 1402, which had not been given previously, due to "a mistake" as the trial court found. CALCRIM No. 1402 defines a firearm enhancement where the defendant is a principal in a gang offense and *another* principal in that offense personally uses a firearm. (§§ 186.22, subd. (b), 12022.53, subd. (e)(1).) This enhancement had been charged against Presley, but had not been included in the information as read to the jury, and was not referenced by section number in the verdict, only by description.

The parties then gave brief arguments to the jury, which resumed its deliberations. Presley's jury found that he did not personally use a firearm, but found that he was a principal in a gang offense in which another principal did personally use a firearm.

As the trial court pointed out, by statute a trial court has the power to instruct the jury "At the beginning of the trial or from time to time during the trial[.]" (§ 1093, subd. (f).) Further, "When the state of the pleadings requires it, or in any other case, for good reasons, and in the sound discretion of the court, the order prescribed in Section 1093 may be departed from." (§ 1094; see *People v. Valenzuela* (1977) 76 Cal.App.3d 218, 220-221.) Further, a more general statute provides: "It shall be the duty of the judge to

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[19] The trial court's response also answered another, unrelated, jury question.

control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (§ 1044; see, e.g., *People v. Ruiloba* (2005) 131 Cal.App.4th 674, 691 [this statute grants trial courts broad discretion].)

Thus, reinstructing the jury is a discretionary call for the trial court, subject to review for abuse of discretion.

In *People v. Young* (2007) 156 Cal.App.4th 1165 (*Young*), we upheld a trial court's decision to reinstruct a jury after an impasse, stating, "When the court is faced with a deadlocked jury, it must proceed carefully, lest its actions be viewed as coercive. [Citation.] At the same time, when faced with questions from the jury, including that they have reached an impasse, 'a court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least *consider* how it can best aid the jury.'" (*Young, supra*, 156 Cal.App.4th at pp. 1171-1172.) And *People v. Ardoin* (2011) 196 Cal.App.4th 102 (*Ardoin*), upheld a trial court's discretion to give a supplemental instruction on felony murder in response to a jury question, but found the trial court erred harmlessly by not reopening to allow defense counsel to provide argument about that new instruction. (*Ardoin, supra*, 196 Cal.App.4th at pp. 127-134.)

Here, we find no abuse of discretion. Although Presley's jury did not report an impasse, or ask about the *precise* issue leading to the supplemental instruction, in ascertaining how to respond to a jury question related to another firearm enhancement, the trial court discovered a critical omission in the instructions. The trial court properly gave a supplemental instruction, in order to insure the jury would fairly resolve all pleaded issues.

Further, as Presley concedes, both counsel were allowed to argue about that supplemental instruction to the jury. Contrary to Presley's speculation, we will not presume that the jury gave undue importance to the supplemental instruction over all

other instructions, nor assume that the supplemental instruction undermined the arguments already given.

In our view, the trial court's actions furthered the ultimate goal of the trial, which was to ascertain the truth. (§ 1044.) We find no abuse of discretion on this record.

Presley also asserts the prosecutor intentionally withdrew liability under section 12055.23, subdivision (e), for tactical reasons, and claims the charge should not have been resurrected by the trial court's reinstruction. But the trial court considered the prosecutor's explanations and found the issue arose due to a mistake. Later, after Presley's newly-retained counsel raised the issue in a new trial motion, the trial court again rejected the claim that the prosecutor had withdrawn the instruction for tactical reasons, telling Presley's new counsel: "I understand you're at a disadvantage because you weren't there, but that didn't happen."

We will not reweigh the evidence to contradict the trial court's finding about the prosecutor's motives. (See *People v. Riccardi* (2012) 54 Cal.4th 758, 787 [in reviewing alleged bias in jury selection "the trial court is 'well positioned' to ascertain the credibility of the prosecutor's explanations"].)

DISPOSITION

The judgments are affirmed. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation certified copies of the corrected abstracts of judgment.

DUARTE, J.

We concur:

BLEASE, Acting P. J.

HULL, J.